IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 17 OF 2006.

Smt. Rupa Mahesh Pai,
major of age,
residing at "Rama Keshav",
Alto Porvorim, Bardez, Goa. ..... Appellant.

Versus

Shri Mahesh Vinayak Pai,
major of age,
residing at First Floor,
Sawant Sadan, Mian Mohammed,
Chotani Road, Cross Road 5,
Mahim, Mumbai-400016. ..... Respondent.

Shri J.P. Mulgaonkar, Advocate for the Appellant.

Shri S. G. Dessai, Senior Advocate with Shri M.S. Joshi, Advocate for the Respondent.

CORAM: A. P. LAVANDE, J.

DATE OF RESERVING THE JUDGMENT: 27.04.2006
DATE OF PRONOUNCING THE JUDGMENT: 04.05.2006

J U D G M E N T:

Heard. Admit. By consent of the parties heard forthwith.

The challenge in this appeal is to the Order dated 22nd February, 2006 passed by the Civil Judge, Senior Division, Mapusa in Civil Misc. Application No. 192/03/B filed by the respondent herein. Briefly the facts which are relevant for disposal of the appeal are as follows :-

2. The appellant and respondent got married on 21st May, 1991 and were staying at Mumbai. Out of the wedlock, Pooja was born on 29th October, 1994. Somewhere in the year 2000 the appellant and the respondent were separated. In October, 2001 the appellant filed Matrimonial Petition No. 51/01/Sr/1 in the Court of the Civil Judge Senior Division, Mapusa, seeking divorce on the ground of cruelty. On 10.02.03 the respondent filed an application seeking custody of the minor child and in the alternative he sought visitation rights to see his daughter in Goa as well as to take his child to Mumbai or any other place during Vacation. After separation the appellant has been residing at Porvorim with her parents and the respondent has been residing at Mumbai with his parents. The minor child has attained puberty.

3. The application was resisted by the appellant by filing reply. However, at the hearing the learned counsel appearing for the respondent pressed for prayer © for taking the child during Vacation. The learned trial Judge maintained the custody of the child with her mother i.e. the appellant and gave visitation rights to the respondent and further allowed the respondent to take the child during Vacation to Mumbai or to any other place which is within the knowledge of the mother. The appellant challenges the Order passed by the learned trial Judge.

4. Mr. Mulgaonkar, learned counsel appearing for the appellant, submitted that the trial Court erred in granting relief © claimed by the respondent without considering the wishes of the minor child which are of paramount importance while deciding whether even temporary custody should be given either to the mother or father. The learned counsel further submitted that the wishes of the child have to be considered before granting any relief of custody or visitation rights and the trial Court erred in not ascertaining the wishes of the child. According to the learned counsel, the child is not prepared to stay even for a short period with the respondent and therefore the impugned Order deserves to be quashed and set aside. He further submitted that while deciding the application for custody of a minor child, the Court has to take into consideration the wishes of the child and not the rights of the parents. In support of his submissions, the learned counsel relied upon the following Judgments :-

(i) Mamta alias Anju v. Ashok Jagannath Bharuka reported in (2005) 12 SCC 452;

(ii) ***Kumar V. Jahgirdar v. Chethana Ramanatheertha*** reported in (2004) 2 SCC 688;

(iii) Bijay K. Prasad v. Ranjana reported in (1999) 9 SCC 544;

(iv) ***Rosy Jacob v. Jacob A. Chakramakkal*** reported in

A.I.R. 1973 S.C. 2090;

(v) Unreported Judgment of the Delhi High Court in CRP No.276/2003 dated 12.04.2004 (**Paramjit Singh Lamba v.Smt. Prabjot Kaur).**

5. Mr. Mulgaonkar submitted that compelling the minor child Pooja to stay with her father against her wishes would have adverse effect on the minor child and would lead to emotional disturbance and unless a bond is established between the minor child and her father, custody of the minor child ought not to have been given to the respondent.

6. Per Contra, Mr. S.G. Dessai, learned Senior Counsel appearing for the respondent, submitted that since this is an Appeal from Order, the scope of interference is very limited and placed reliance upon e provisions of Articles 1452 to 1460 of the Portuguese Civil Procedure Code. He further submitted that in the present case there is no need of ascertaining the wishes of the minor child since she is bound to say that she does not want to be with the respondent on account of the fact that she has been with the appellant for a considerable length of time and naturally she must have been tutored by the appellant to say so. According to the learned Senior Counsel, refusal of the minor child to be with her father is on account of “Parental Alienation Syndrome”, as has been referred to in the

Judgment of the Apex Court reported in ***Sheila B. Das v. P.R. Sugasree (2006) 3 SCC 62.*** He further submitted that there is no allegation of ill treatment by the respondent of the minor child and the appellant even in her evidence has admitted that she will have no objection to give custody to the respondent if the child agrees to be with the respondent. He further submitted that it is the right of the father to be with his child and, therefore, the mere fact that the child does not wish to be with her father is not conclusive. According to the learned counsel, the Judgments relied upon on behalf of the appellant are clearly distinguishable. In support of his submissions, the learned Senior Counsel relied upon the Judgment of the Apex Court reported in (2006) 3 SCC 62 and on an unreported Order dated 18.10.04 passed by this Court in Civil Application No.82/04 in Family Court Appeal No.57/04 by a Division Bench of this Court and on a Judgment of this Court in ***Shri Agnelo Rasquinha v. Smt. Maria Cynthia Luiza de Piedade Colaco Rasquinha*** reported in 1989 G.L.T. 28.

7. I have considered the submissions of the learned counsel appearing for the parties and perused the Judgments relied upon by them. During the course of the hearing, since the child was not interviewed by the trial Judge, I interviewed the child in chamber to ascertain her wishes. She exhibited total reluctance to be with her father even during Vacation.

8. Admittedly, the appellant is residing at Porvorim in Goa with her parents and the respondent is residing with his parents at Mumbai. The question therefore is whether the respondent should be permitted to take the child during Vacation to Mumbai or any other place of his choice either in Goa or some other place as has been directed by the trial Court ? Considering the judgments relied upon by the learned Counsel for the appellant as well as the respondent, one thing clearly emerges is that the Apex Court has consistently held that it is the wish of the child which has to be taken into consideration for determining as to whom the custody of the child should be given. The facts before the Apex Court in the case of **Bijay K. Prasad** (Supra) are almost identical to the present case. The Apex Court in the said Judgment has held that the preference of the child is paramount. In the said case the child whose wishes were ascertained by the Hon'ble Judges of the Apex Court, had categorically stated that she would like to stay with her father. Therefore the Apex Court set aside the direction given by the Family Court that the child should stay with her mother during the holidays and further held that any direction to meet the child could be obtained from the Family Court. The facts in the said case are almost identical in the present case. Therefore the impugned order insofar as it permits the respondent to take the child during vacation cannot be sustained and deserves to be set aside. Even if the argument of Mr. Dessai that the minor child has been exposed by the appellant to “Parental

Alienation Syndrome" is accepted, that by itself, will not be sufficient to hold that the respondent is entitled to take the child to Mumbai or to any other place during vacation, against the wishes of the minor child. No doubt the respondent as father of the minor child is entitled to visit the child so that a bond is developed between him and his daughter which may ultimately result in getting rid of "Parental Alienation Syndrome", as urged by the respondent.

9. In the light of the above discussion, I am of the opinion that the trial Court erred in giving liberty to the respondent to take the child during vacation to Mumbai or to any other place. However, insofar as visitation rights are concerned, the trial Court shall, after hearing the appellant and the respondent, pass appropriate Order regarding visitation rights of the respondent. The trial Court has not made it clear whether the order relates to summer vacation or all future vacations. It is made clear that the Order of the trial Court is set aside only in relation to the custody of the child during summer vacation of 2006. The respondent will be at liberty to file appropriate application for custody of the child during subsequent vacations.

10. In order to enable the parties to get appropriate order from the trial Court in respect of visitation rights of the respondent, the parties to

appear before the trial Court on 8th May, 2006 at 10.00 a.m. and the trial Court shall, after hearing the parties, pass appropriate order on or before 10th May, 2006.

11. In the result, therefore, the Appeal is allowed in the aforesaid terms. Parties to bear their own costs.

A. P. LAVANDE, J.

sl.